

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-110V

Filed: January 17, 2008

Not to be Published

PAULINE BRISTER, *
*
Petitioner, *
*
v. *
*
SECRETARY OF HEALTH AND *
HUMAN SERVICES, *
*
Respondent. *
*

Fact Ruling and Order

This case has from the outset presented two key issues that have slowed resolution. First, despite extensive efforts by petitioner's counsel, documentation of immunization from petitioner's workplace, where the immunization was allegedly administered, no longer exists. The second issue is the timing of the onset of symptoms. While there are some general references in the record to when the symptoms began, they are not of such specificity to eliminate questions of timing. See Petitioner's Status Report filed July 25, 2006. Thus, in an effort to resolve these issues, a fact hearing was conducted on August 9, 2007 to take petitioner's testimony, and the testimony of other supporting fact witnesses.

After considering the record to date, including a cogent Posthearing Memorandum from petitioner, the undersigned finds that the fact of immunization is established and petitioner's arm

pain began in temporal relationship to that immunization.¹ The reasoning will be discussed briefly below.

Petitioner filed her petition for compensation on March 5, 1999 alleging that she received a HepB vaccination “on or about March of 1997” and suffered an adverse reaction thereto. Petition at 3. As stated above, the reason for the fact hearing was the paucity, through no fault of petitioner, of medical records. However, the credible testimony of the three fact witnesses when read together with the contemporaneous medical records paint a persuasive, consistent picture that petitioner received a HepB immunization shortly after returning to work with Miami Cerebral Palsy Residential Services and began complaining almost immediately thereafter of left arm pain.²

Most importantly to the undersigned are the corroborating medical records, which are concededly few. Petitioner returned to Miami Cerebral Palsy on February 11, 1997. P Ex. 6 at 13. She testified that she received the vaccination as part of her employment. Tr. at 11. Her supervisor, Sarah Smith confirmed that employees could get the vaccination at their discretion. Tr. at 56; see also P Ex. 6 at 23. Dr. Chang’s handwritten note, as interpreted by Dr. Chang, states “Hepatitis B 3-4/97 (March or April, 97)”. P Ex. 20. Also, the history given to Dr. Brown in February of 1998 included “She took 1 Hepatitis B vaccine & as needle was withdrawn she had pain..” P Ex. 16 at 16. While this is by no means perfect evidence of the fact of immunization, these records coupled with the witness testimony establishes by a preponderance of the evidence that petitioner did receive an the HepB immunization shortly following the start of work in February.

Similarly, the combination of testimony and medical records establish the onset of arm pain shortly following that immunization. In addition to the Baptist Hospital ER records, P Ex. 14, that confirm petitioner’s testimony about the worsening of her pain in July of 1997, see generally Petitioner’s Posthearing Memorandum at 3, an admission note from August 31, 1997 records a history of left shoulder pain “for the past six months.” P Ex. 4 at 24. In addition, the note records the onset of diffuse body pain “six weeks ago.” Id. This history is critical in a number of important respects. First, it tracks the testimony of petitioner, and thus establishes her credibility as a historian. Second, when read together with the testimony regarding symptoms following shortly after immunization and Dr. Chang’s later note of a HepB vaccination in April or March, it confirms the critical facts of receipt of an immunization and the onset of symptoms shortly thereafter. In essence, this record ties together the other pieces of information. See also Dr. Brown’s February 2, 1998 history at P Ex.16 at 16. Accordingly, the undersigned finds that

¹The undersigned is cognizant that this ruling conflicts with the oral findings on the timing of onset given immediately following the hearing. However, after considering petitioner’s Posthearing Memorandum in conjunction with re-reading the medical records and considering carefully the transcript of the testimony, the undersigned is convinced that the evidence preponderates in petitioner’s favor.

²The undersigned notes that in reaching this conclusion the undersigned is in full agreement with the analysis set forth in petitioner’s Posthearing Memorandum.

petitioner has proven by a preponderance of the evidence that she received the HepB vaccination and experienced left shoulder pain shortly thereafter.

In making these findings, the undersigned emphasizes that this ruling is limited to these two specific findings: fact of immunization and fact of onset. We are analyzing events that occurred over ten years ago, without substantial medical record corroboration. The witness testimony, while credible on the two issues decided herein, was notable for the limited information provided and the lack of recall on other issues. See, e.g., Tr. at 39. The bottom line of this Ruling is that the undersigned will rely on information in the medical records to the extent that there are any conflicts between the witness testimony and the records. In addition, the undersigned will rely heavily on the medical experts for the proper interpretation of these medical records, that is, in addition to the issue of causation, the course of petitioner's injury and whether later symptoms and conditions are related to the initial symptom of left arm pain following the immunization.

Accordingly, petitioner must now produce an expert opinion supporting her case. The expert must establish the vaccine's causative role and link petitioner's subsequent medical problems to her initial symptom of left arm pain. Petitioner shall file her expert report **by no later than March 21, 2008**. If petitioner is unable to produce an expert report by that date, petitioner shall file a brief status report detailing her efforts in obtaining such report. Respondent's time for a responsive expert report will be set in a later order.

The undersigned notes that the parties should consider resolving this case informally. Petitioner is nearing 80 years old. The case is now nearing nine years old. An additional two-three years to hear and resolve issues of entitlement, and if necessary, damages would not be an unreasonable estimate. While no one involved in handling this case should be faulted, we can agree that twelve-thirteen years to resolve petitioner's claim is not doing justice to this petitioner. In addition, HepB/rheumatological cases have been compensated and settled in the past. Thus, petitioner's claim of causation is not unheard of or unreasonable. Taking all of these factors into consideration, the undersigned asks the parties to consider a reasonable settlement of this case to finally and quickly resolve this matter.

IT IS SO ORDERED.

s/ Gary J. Golkiewicz

Gary J. Golkiewicz
Chief Special Master